Office - Supreme Court, U.S.
FILED
AUG 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-102

In The

Supreme Court of the United States

October Term, 1982

FOY HASKELL DAWKINS
AND MARY LORENA DAWKINS,
Petitioners

vs.

JODY DAWKINS FENSLAGE,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CARY SCHACHTER
GEORGE WHITTENBURG
WHITTENBURG, WHITTENBURG
& SCHACHTER
P.O. Box 31718
Amarillo, Texas 79120
(806) 372-5671
Counsel for Respondent

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS 75208 — (214) 748-6022

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Argument	1
Conclusion	3

Table Of Authorities

Cases **Page**

Archibald v. Jacobs, 6 S.W. 177 (Tex. 1887) 2

Bush v. Allstate Insurance Co., 425 F.2d 393 (5th Cir.), cert. denied, 400 U.S. 833 (1970) 3

Chandler Supply Co. v. GAF Corp., 650 F.2d 983 (9th Cir. 1980) 2

Duncan v. First National Bank, 597 F.2d 51 (5th Cir. 1979) 2

Roman v. Goldberg, 7 S.W.2d 899 (Tex. Civ. App. 1928) 2

Smith v. Kale, 32 Tex. 290 (1869) 2

Thulemeyer v. Jones, 37 Tex. 560 (1872) 2

Statute

11 U.S.C.A. §547 (1979) 2

No. 82-102

In The

Supreme Court of the United States

October Term, 1982

FOY HASKELL DAWKINS
AND MARY LORENA DAWKINS,
Petitioners

vs.

JODY DAWKINS FENSLAGE,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Mr. and Mrs. Dawkins do not even suggest that special and important reasons require granting of the petition, and examination of the questions presented confirms that no important issue of federal law arises.

The first question is whether Mr. and Mrs. Dawkins had a valid Texas homestead exemption for land where they never lived at a time when they claimed property

where they were living as their homestead. The court of appeals properly held that Texas allows only one homestead, and no new homestead can be acquired until abandonment of the old. *Archibald v. Jacobs*, 6 S.W. 177, 178-79 (Tex. 1887).

Mr. and Mrs. Dawkins next contend that an execution sale to foreclose a judgment lien created years before the filing of a petition for reorganization constitutes a voidable transfer under 11 U.S.C.A. § 547 (1979). This is also a Texas law question. Section 547(e)(1)(a) provides that "a transfer of real property . . . is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee."

Under applicable Texas law, the subsequent affirmance of a trial court judgment is not necessary to perfect a judgment lien. *Thulemeyer v. Jones*, 37 Tex. 560 (1872); *Roman v. Goldberg*, 7 S.W. 2d 899 (Tex. Civ. App. 1928). *See also Smith v. Kale*, 32 Tex. 290 (1869). The court of appeals properly followed these holdings.

The last question presented by Mr. and Mrs. Dawkins is whether they were "illegally" denied a jury trial. Their pleadings contained no demand for jury trial. They appeared at the bench trial and — without protesting the lack of a jury — announced that they were ready. They objected to the absence of a jury for the first time only after they lost in the trial court. The holding below merely follows well-established precedent that a jury trial may be waived. *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983 (9th Cir. 1980); *Duncan v. First National Bank*, 597 F.2d

51 (5th Cir. 1979); *Bush v. Allstate Insurance Co.*, 425 F.2d 393 (5th Cir.), *cert. denied*, 400 U.S. 833 (1970).

In short, there is no question of substance raised by this petition. Mr. and Mrs. Dawkins have had their contentions reviewed thoroughly by written opinions in the bankruptcy court, the district court, and the court of appeals. The petition for certiorari should be denied.

Respectfully submitted,

WHITTENBURG, WHITTENBURG & SCHACHTER
Cary Schachter
George Whittenburg
P.O. Box 31718
Amarillo, Texas 79120
(806) 372-5671
Attorneys for Respondent

Cary Schachter
Of Counsel